No. 18-726

In the Supreme Court of the United States

LINDA H. LAMONE, *State Administrator of Elections, and* DAVID J. MCMANUS, JR., *Chairman of the Maryland State Board of Elections,*

Appellants,

v.

O. JOHN BENISEK, EDMUND CUEMAN, JEREMIAH DEWOLF, CHARLES W. EYLER, JR., KAT O'CONNOR, ALONNIE L. ROPP, *and* SHARON STRINE,

Appellees.

On Appeal from the United States District Court for the District of Maryland

MOTION TO AFFIRM

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QUESTION PRESENTED

State officials responsible for Maryland's 2011 congressional redistricting targeted plaintiffs and other like-minded voters for disfavored treatment because of their past support for Republican candidates for public office. These officials' aims were achieved: the weight of Republicans' votes in Maryland's Sixth Congressional District was severely diluted and Republicans' associational activities were significantly disrupted as a result of the gerrymander.

After more than four years of litigation and two previous appeals before this Court, all three judges below agreed that the 2011 gerrymander of Maryland's Sixth Congressional District violated the First Amendment's prohibition on official retaliation for political expression.

The questions presented are:

1. Does partisan gerrymandering violate the First Amendment's prohibition on official retaliation for political expression?

2. Is a First Amendment retaliation challenge to a partisan gerrymander justiciable in federal court?

3. Did the district court properly grant a final judgment and permanent injunctive relief to plaintiffs in light of the undisputed facts of record?

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INTRODUCTION

The Charter of our government establishes a representative democracy. See U.S. Const. art. I, § 2, cl. 1. "Representative democracies * * * function by electing certain [people] for certain periods of time, then passing judgment periodically on their conduct of public office." Alexander M. Bickel, *The Least Dangerous Branch* 17 (1962) (Yale 1986 ed.). "It is a matter of laying on of hands, followed in time by a process of holding to account—all through the exercise of the franchise." *Ibid.*

The practice of partisan gerrymandering—aided in modern times by sophisticated software and the most detailed troves of data imaginable—is at war with this system of government. It aims to insulate those in power—those whom the public has taken into their trust—from being held to account. Its purpose is to reduce the franchise to a charade—a meaningless exercise, the outcome of which is preordained by computer scientists and political consultants turned cartographers.

If this Court does not take the opportunity, once and for all, to condemn political gerrymandering as the First Amendment violation that it is, it will be giving a green light to lawmakers across the country to engage in gerrymandering in 2020 like never before. It will make the 2010 cycle look like child's play.

The State's position is that the Court is powerless to do anything about it—that the Supreme Court of the United States must stand idly by as American democracy is undermined. That is wrong; without at all calling into question the passive virtues (Alexander M. Bickel, *The Passive Virtues*, 75 Harv. L. Rev. 40 (1961)), the Court is not, has not been, and cannot be a mere spectator in the public life of the Nation.

The framework the district court applied to the uncontested facts of this case is justiciable. Courts are frequently called upon to evaluate the kinds of burdens at issue here, including vote dilution (*e.g.*, *Cooper* v. *Harris*, 137 S. Ct. 1455 (2017)) and associational harms (*e.g.*, *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983)). These are not the kinds of burdens that courts lack the tools to evaluate. And the First Amendment theory here leaves room for mapmakers to pursue all kinds of political objectives in redistricting, ensuring general consistency with this Court's prior cases.

The State's hodgepodge of rejoinders falls flat. The First Amendment retaliation doctrine, applied to partisan gerrymandering, does not outlaw pursuit of proportionally representative delegations. Nor does it assume the constitutionality of the immediately prior district; the only question is whether the State deliberately prevented voters from forming a majority in a reasonably configured district on account of their party affiliation or voting history; it makes no difference what the prior district looked like. And the doctrine likewise gives clear guidance to legislators: Lawmakers must not deliberately target voters for disfavored treatment on the basis of their past political expression. That should not be a controversial rule.

The State's efforts to hide behind procedure also fail. The grant of summary judgment below turned entirely on undisputed facts; indeed, the State itself repeatedly disavowed the need for a trial. And none of the State's evidentiary objections holds up. Courts have also often ordered new maps for the final election before the next census; the district court did not abuse its discretion to do so here.

The Court should summarily affirm. If it instead orders full briefing and argument, and it does so in

Rucho v. *Common Cause* (No. 18-422) as well, it should set the two cases for hearing on the same date.

STATEMENT

A. Factual background

The undisputed facts of record (JS App. 5a) establish the following.

1. For the great majority of the 50 years leading up to Maryland's 2011 redistricting, the State's congressional delegation had comprised five or six Democrats and two or three Republicans. But Maryland's Democratic leaders considered it their duty in 2011 to crack the Republican majority in one of Maryland's two Republican districts at the time, ensuring a "7-1" delegation from then on.

"Governor O'Malley took responsibility for creating the 2011 congressional redistricting plan." JS App. 12a. "He testified explicitly that he wanted to use the redistricting process to change the overall composition of Maryland's congressional delegation to 7 Democrats and 1 Republican by flipping either the First District on the Eastern Shore of Maryland or the Sixth District in western Maryland." *Ibid.* "After brief consideration, Governor O'Malley rejected the notion of flipping the First District because the resulting district would have to jump across the Chesapeake Bay." *Id.* at 13a. "Consequently, 'a decision was made to go for the Sixth.'" *Ibid.* (emphasis omitted) (quoting Governor O'Malley's deposition testimony).

"Governor O'Malley appointed the Governor's Redistricting Advisory Committee as the public face of his effort, directing it to hold public hearings and recommend a redistricting plan." JS App. 13a. "But at the same time," he asked U.S. House Minority Whip Steny Hoyer, a self-described "serial gerrymanderer," to "come up with a map" on behalf of the sitting con-

gressional delegation. *Id.* at 13a-14a. "Hoyer and other members of the delegation retained NCEC Services" and instructed the firm to "draw[] a map that maximized 'incumbent protection' for Democrats and that changed the congressional delegation from 6 Democrats and 2 Republicans to 7 Democrats and 1 Republican." *Id.* at 14a. See *ibid.* (Senate President Mike Miller testifying that the map "primarily was drawn by the congressional people").

In undertaking his assignment, NCEC's president, Eric Hawkins, used NCEC's "proprietary metric * * * called the Democratic Performance Index ('DPI'), which measures how a generic Democratic candidate would likely perform in a particular district." JS App. 15a. "Hawkins testified that he used the DPI * * * to draw a map that would maximize 'incumbent protection' for the Democrats currently representing Maryland districts in Congress and that would 'chang[e] the make-up of Maryland's U.S. House delegation from six Democrats and two Republicans to seven Democrats and one Republican.'" *Id.* at 16a.

"With respect to this 7-1 goal," the court went on, "Hawkins' efforts focused on redrawing the Sixth District's lines to increase its federal DPI." JS App. 16a. Whereas the district's DPI had been 37.4% under the previous map (indicating a near-certain Republican win), "Hawkins prepared several different maps under which the Sixth District would have had at least a 51% federal DPI." *Ibid.* "In preparing these draft maps, Hawkins considered neither 'any measure of compactness,' nor whether 'there was a community of interest related to the I-270 corridor.'" *Ibid.* "Rather, '[t]he intent was to see if there was a way to get another Democratic district in the state.'" *Ibid.* And while alternative maps were proposed by third parties during the

same timeframe, "they resulted in a far lower federal DPI for the Sixth District and were not used." *Ibid.*

"[A] group of staffers to the State's most senior Democratic leaders" was assigned ultimate responsibility for finalizing the draft map. JS App. 17a. These staffers' data files tellingly had NCEC's proprietary DPI metric built into them, and email traffic shows that Hawkins "assisted at least some of these staffers as they continued working on the congressional map" through its completion. *Ibid.*

The final map released by the Advisory Committee "had a federal DPI of 53% in the Sixth District, which was greeted as 'good news' by the man who was widely expected to be the Democratic nominee to represent the newly redrawn District in the upcoming 2012 election." JS App. 20a. Following a closed caucus meeting in which the map was introduced to the Democrats in Maryland's General Assembly, "Delegate Curt Anderson told a reporter, 'It reminded me of a weather woman standing in front of the map saying, "Here comes a cold front," and in this case the cold front is going to be hitting Roscoe Bartlett pretty hard.'" *Id.* at 22a (quoting joint stipulations). Other lawmakers likewise acknowledged their goal of ensuring that a Democrat would win the Sixth District moving forward. *Id.* at 23a-24a.

2. "[T]he Democratic officials responsible for the plan redrew the Sixth District's boundaries far more dramatically than was necessary" to comply with the one-person-one-vote standard, which would have required "remov[ing just] 10,186 residents from the District." JS App. 7a. On the whole, the redrawing shifted several hundred thousand residents; "[t]he registered voters removed from the former Sixth District were predominately Republican, while those added were

predominately Democratic." *Id.* at 10a. "In total, the reshuffling of the Sixth District's voters resulted in a net reduction of roughly 66,000 registered Republicans and a net increase of some 24,000 registered Democrats, for a swing of about 90,000 voters." *Id.* at 11a. And "for the first time since 1840" (*id.* at 73a), it split Frederick County, which had been in the Sixth District for the prior 140 years (*id.* at 20a). As a result of this upheaval, those living in rural western Maryland—bordering West Virginia and southwestern Pennsylvania—are now represented by a congressman elected by wealthy suburban Democrats over 150 miles away, in the suburbs of Washington, D.C.

Most of the Republican voters removed from the Sixth District were reassigned to the Eighth District. JS App. 11a. "[E]ven though the number of registered Republicans in the Eighth District [therefore] rose significantly after the transfer of Republicans from the Sixth District, registered Democrats still outnumbered registered Republicans by nearly 2 to 1." *Id.* at 12a.

The results of the gerrymander have been "precisely as intended and predicted." JS App. 24a. Following the 2011 redistricting, the Sixth District swung from a "Solid Republican" ranking by the *Cook Political Report* to a "Likely Democratic" ranking. *Id.* at 25a. An academic study of the ranking's accuracy showed that, as a consequence of the redistricting, the chances that a Democrat would win the district skyrocketed from 0.3% in 2010 to 94.0% in 2012. *Ibid.* The DPI similarly "confirmed that the Democrats held a clear electoral advantage in the District as a result of its redistricting." *Id.* at 25a-26a.

"The record demonstrates further that, in addition to the reduced opportunity to elect a candidate of their choice, the plaintiffs and other active members of

Maryland's Republican Party faced new difficulties in their organizational efforts as a result of the redistricting." JS App. 26a. Plaintiff Sharon Strine testified, for example, that the gerrymander made campaigning in the district more difficult, including by depressing voter interest and enthusiasm. *Ibid.* Plaintiff Alonnie Ropp similarly testified that the gerrymander's fracturing of Frederick County made voter engagement difficult and confusing. *Id.* at 26a-27a. Plaintiff Ned Cueman explained that his connection with historic portions of the district had been severed; it was a "chop job," and he had "absolutely no connection with what is in this [new] district." *Id.* at 27a.

"Other record evidence corroborate[d]" this testimony, "including evidence showing that Sixth District registered Republican voters' participation declined in primary elections in midterm years." JS App. 28a. "Similarly, the record shows a decline in fundraising by the Republican Central Committees of the three counties that remained entirely within the Sixth District after the 2011 redistricting." *Ibid.*

B. Procedural background

1. The initial pro se proceedings and first appeal

Three initial plaintiffs filed suit, challenging the 2011 gerrymander as (among other things) a violation of their First Amendment rights. Dkt. 11, ¶¶ 2, 23.

A single-judge district court dismissed the case without convening a three-judge court. *Benisek* v. *Mack*, 11 F. Supp. 3d 516 (D. Md. 2014). The Fourth Circuit affirmed. *Benisek* v. *Mack*, 584 F. App'x 140 (4th Cir. 2014).

This Court granted review and reversed. *Shapiro* v. *McManus*, 136 S. Ct. 450 (2015). Of relevance here, the Court held that plaintiffs' First Amendment challenge

to Maryland's 2011 gerrymander should have been referred to a three-judge district court pursuant to 28 U.S.C. 2284 because it is "based on a legal theory put forward by a Justice of this Court" and "uncontradicted" by any of the Court's cases. 136 S. Ct. at 456.

2. The denial of the motion to dismiss

On remand, plaintiffs "promptly filed a second amended complaint in February 2016," about "one week after [the] three-judge court was empaneled." JS App. 29a. "The amended complaint added six additional plaintiffs and refined the [First Amendment] theory underlying their constitutional challenge." *Ibid.*

The district court denied the State's motion to dismiss. JS App. 172a-225a.

"[W]hen a State draws the boundaries of its electoral districts so as to dilute the votes of certain of its citizens," the majority explained, "the practice imposes a burden on those citizens' right to 'have an equally effective voice in the election' of a legislator to represent them." JS App. 195a. "The practice of *purposefully* diluting the weight of certain citizens' votes to make it more difficult for them to achieve electoral success *because of* the political views they have expressed through their voting histories and party affiliations thus infringes this representational right." *Id.* at 196a.

Observing that "there is no redistricting exception" to the First Amendment's protections, the majority concluded that a plaintiff bringing a First Amendment retaliation challenge to a partisan gerrymander "must allege that those responsible for the map redrew the lines of his district with the specific intent to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated." JS App. 198a-199a (emphasis omit-

ted). They must also prove a concrete harm and causation. *Id.* at 199a-202a.

Finding that this inquiry was judicially manageable, the court "recognize[d] the justiciability of a claim challenging redistricting under the First Amendment and Article I, § 2." JS App. 203a.

Chief Judge Bredar dissented. JS App. 206a-225a. Although he concluded that harm based on vote dilution is nonjusticiable (*id.* at 210a, 225a), he recognized that "[t]here may yet come a day when federal courts, finally armed with a reliable standard, are equipped to adjudicate political gerrymandering claims." *Id.* at 224a.

3. The denial of preliminary relief and second appeal

Following lengthy discovery, plaintiffs moved for a preliminary injunction and, in the alternative, for summary judgment. JS App. 30a. The State filed an opposition to the motion for a preliminary injunction and alternatively cross-moved for summary judgment. *Ibid.* Both parties agreed that there were no genuine factual disputes necessitating a trial. See Dkt. 177-1, at 25 (plaintiffs' brief); Dkt. 186-1, at 25-46 (State's brief).

The district court denied a preliminary injunction and stayed the proceedings. JS App. 82a-119a. Judge Niemeyer dissented. *Id.* at 119a-171a.

This Court affirmed. See *Benisek* v. *Lamone*, 138 S. Ct. 1942 (2018) (per curiam). Without reaching the merits of plaintiffs' First Amendment claim, the Court concluded that "a due regard for the public interest in orderly elections supported the District Court's discretionary decision to deny a preliminary injunction" given the proximity of the 2018 elections. *Id.* at 1944-1945. "On top of this time constraint," the Court explained, "was the legal uncertainty surrounding any

potential remedy for the plaintiffs' asserted injury." *Id.* at 1945. "In these particular circumstances," the Court concluded, "the District Court's decision denying a preliminary injunction cannot be regarded as an abuse of discretion." *Ibid.*

4. The unanimous entry of final judgment for plaintiffs

a. On remand a second time, the parties filed a joint status report in which the State reaffirmed that "this matter is appropriate for resolution on summary judgment," without need for a trial. Dkt. 209, at 3.

To that end, the parties filed supplemental summary judgment briefs. We reiterated in our brief that plaintiffs had suffered vote dilution according to the traditional *Gingles* preconditions. Dkt. 210, at 5-15. We also showed that Republican voters' associational activities had been significantly chilled and disrupted by the gerrymander, resulting in lower voter turnout and depressed fundraising. *Id.* at 15-18.[1]

To add further support for the second point, we attached voting data and campaign finance reports available on the State's own website, together with an affidavit that performed basic addition and division.

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[1] The State incorrectly calls this second point a "new claim." JS 11. In fact, plaintiffs alleged in the second amended complaint that the gerrymander "chilled and manipulated political participation" in the Sixth District, including by making citizens less likely to vote and "less likely to participate actively in campaigning." Dkt. 40-1, ¶¶ 112-119. In our opening summary judgment brief, we pointed to evidence that political participation had been "chilled and disrupted" by the gerrymander. Dkt. 177-1, at 18-19. And in our principal brief before this Court in the second appeal, we explained (at 43) that successful gerrymanders depress associational activities by "reduc[ing] * * * political engagement" and "inhibit[ing] fundraising and recruitment of volunteers."

The district court unanimously denied the State's motion to strike this material. Dkt. 219.

b. On November 7, 2018—the day after the 2018 congressional elections—the three-judge court unanimously granted final judgment to plaintiffs and enjoined the State from using the 2011 redistricting map in any future elections. JS App. 1a-77a.

The district court held first that plaintiffs have standing. JS App. 43a-47a. "The plaintiffs in this case, unlike the plaintiffs in *Gill* [v. *Whitford*, 138 S. Ct. 1916 (2018)], have brought and pursued the kind of single-district challenge that *Gill* recognized as providing * * * standing." *Id.* at 47a.

"Turning to the merits," the court ruled that the "undisputed facts" in the record "establish[] each element of [plaintiffs'] First Amendment claim that their representational rights have been impermissibly burdened by reason of their political views and voting history." JS App. 48a.

> ***First***, with respect to the mapmakers' intent, the process described in the record admits of no doubt. Maryland Democratic officials worked to establish Maryland's congressional district boundaries in 2011 with a narrow focus on diluting the votes of Republicans in the Sixth Congressional District in an attempt to ensure the election of an additional Democratic representative in the State's [eight-member] congressional delegation.

Ibid. (boldface added). Indeed, "the record is replete with direct evidence of this precise purpose." *Id.* at 49a.

The court rejected the State's argument that an intent to help Democrats is not the same as an intent to harm Republicans. "If the government uses partisan registration and voting data purposefully to draw a

district that disfavors one party, it cannot escape liability by recharacterizing its actions as intended to favor the other party." JS App. 50a. There is no legal basis to "distinguish between these intents" in a two-party, winner-take-all election. *Ibid.*

The court also rejected the State's argument that the First Amendment requires proof that lawmakers "target[ed] *specific* voters based on their individual party affiliation or voting history." JS App. 51a. "The fact that the State intentionally moved Republican voters out of the Sixth District en masse, based on precinct-level data, and did not examine each individual voter's history does not make its action permissible under the First Amendment." *Ibid.*

> ***Second***, with respect to the injury element, the plaintiffs have shown that the redrawn Sixth District did, in fact, meaningfully burden their representational rights.

JS App. 52a (boldface added). On this point, the court stressed that "plaintiffs must have experienced a 'demonstrable and concrete adverse effect' on their right to have 'an equally effective voice in the election' of a representative, which they can establish by showing that they have been placed at a concrete electoral disadvantage." *Ibid.* And "[t]he plaintiffs here have made that showing" with evidence of vote dilution confirmed by both parties' experts. *Id.* at 53a.

Drawing on Justice Kagan's concurring opinion in *Gill*, the court held further that "plaintiffs can prove injury in the form of associational harm, as 'distinct from vote dilution,' by showing that the State has 'burdened the ability of like-minded people across the State to affiliate in a political party and carry out that organization's activities and objects.'" JS App. 58a (quoting 138 S. Ct. at 1938-1939).

Here too, the court held, "the plaintiffs have shown that the 2011 redistricting plan did indeed burden their associational rights," in several ways. JS App. 61a. For example, "voter engagement in support of the Republican Party dropped significantly" following the gerrymander. *Id.* at 62a. Testimony thus "revealed a lack of enthusiasm, indifference to voting, a sense of disenfranchisement, a sense of disconnection, and confusion after the 2011 redistricting by voters," making it more difficult for plaintiffs and other Republicans "to 'band together in promoting among the electorate candidates who espouse their political views.'" *Ibid.* In addition, there was undisputed evidence "that fundraising by the Republican Central Committees of the counties that remained entirely within the Sixth District after the 2011 redistricting dropped off after the redistricting in both midterm and presidential elections." *Id.* at 63a.

The "undisputed evidence" thus "amply demonstrate[d] that the plaintiffs' associational rights were burdened." JS App. 63a.

> ***Finally***, as to causation, the plaintiffs have established that, without the State's retaliatory intent, the Sixth District's boundaries would not have been drawn to dilute the electoral power of Republican voters nearly to the same extent.

JS App. 54a (boldface added). And it was the same "reshuffling that caused the associational harms noted." *Id.* at 64a.

Having held that the undisputed record evidence established a First Amendment violation, the court addressed the standard for entering a permanent injunction. On this score, the court emphasized that plaintiffs' request for permanent injunctive relief dates to

the original complaint, filed in 2013. JS App. 66a. "While it is true that the case has dragged on" in the interim, the court found that the "protraction cannot be attributed to the plaintiffs, but to process." *Ibid.* The court thus held that both plaintiffs and defendants had been diligent in their litigation of the case. *Ibid.*

Concluding that the "balance of the equities" and the "public interest" both favor a permanent injunction (JS App. 64a-67a), the court enjoined the State from using the 2011 redistricting map in future elections and ordered the preparation of a new map.

c. Chief Judge Bredar concurred in the judgment. JS App. 67a-76a. Although he remained skeptical of our vote dilution theory because it turns in part on "evidence of electoral outcomes as proof that the gerrymander succeeded" (*id.* at 70a), Chief Judge Bredar "embrac[ed]" the "associational rights theory" (*id.* at 71a). "Regardless of whether the State succeeded in its obvious intent to increase the likelihood that a Democrat would win the Sixth District," he reasoned, "the State certainly caused harm." *Id.* at 72a. In this way, "[t]he State *retaliated* against voters for those associations." *Ibid.*

d. Judge Russell concurred separately, joining both Judge Niemeyer's lead opinion and Chief Judge Bredar's concurrence. JS App. 76a-77a.

e. The State moved for a discretionary stay of the injunction. Dkt. 226. Plaintiffs consented on the conditions that (1) the parties brief jurisdiction before this Court on a sufficiently expedited schedule to ensure adequate time for this Court either to summarily affirm or to note probable jurisdiction and rule on the merits this Term and (2) the State stipulate to the fact that there will be sufficient time to draw a new map

before the 2020 elections following a decision from this Court in June 2019. See Dkt. 227.

ARGUMENT

After more than four years of litigation and nine published decisions (including two from this Court) the district court entered a unanimous final judgment in favor of plaintiffs, enjoining enforcement of Maryland's unlawful 2011 political gerrymander of its Sixth Congressional District.

The standards determined and applied by the district court, grounded in well-settled First Amendment doctrine, are readily justiciable. And plaintiffs' entitlement to relief under those standards is beyond cavil. The Court accordingly should affirm.

I. PARTISAN GERRYMANDERING VIOLATES THE FIRST AMENDMENT

A. Plaintiffs' First Amendment retaliation claim is justiciable

1. The First Amendment prohibits a State from subjecting individuals to disfavored treatment on the basis of their speech or politics, whether it be in the context of hiring or firing employees, granting or terminating contracts, or punishing or rewarding prison inmates. See *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712 (1996) (public employment); *Board of Cty. Comm'rs* v. *Umbehr*, 518 U.S. 668 (1996) (public contracts); *Ortiz* v. *Jordan*, 562 U.S. 180 (2011) (prisoner retaliation).

The same logic describes the constitutional violation inherent in partisan gerrymanders. "[P]olitical belief and association constitute the core of those activities protected by the First Amendment." *Rutan* v. *Republican Party*, 497 U.S. 62, 69 (1990) (quoting *Elrod* v. *Burns*, 427 U.S. 347, 356 (1976) (plurality)). Indeed, "[n]o right is more precious in a free country

than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams* v. *Rhodes*, 393 U.S. 23, 31 (1968) (quoting *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964)).

Because there is this "right of qualified voters, regardless of their political persuasion, to cast their votes effectively" (*Anderson* v. *Celebrezze*, 460 U.S. 780, 787 (1983)), it follows that "general First Amendment principles" prohibit a State from subjecting citizens to "disfavored treatment" because of their "voting history" or "association with a political party." *Vieth* v. *Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment). That is, citizens enjoy a First Amendment right not to be "burden[ed] or penaliz[ed]" for their "voting history," "association with a political party," or "expression of political views." *Ibid.* Indeed, "[i]f a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation." *Id.* at 315. Accord *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 461 (2006) (*LULAC*) (Stevens, J., concurring in part and dissenting in part).

The State has never expressly disagreed with these basic principles. It has never asserted a right to use redistricting to burden voters by reason of their support for the opposition party, nor has it disagreed that partisan gerrymandering, like political patronage, "is inimical to the process which undergirds our system of government and is 'at war with the deeper traditions of democracy embodied in the First Amendment.'" *Elrod*, 427 U.S. at 357 (plurality). The State instead has taken the position that the First Amendment retal-

iation framework is nonjusticiable when applied in the redistricting context. That is mistaken.

2.a. The starting point for federal litigation is "the concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of [Article] III." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974). Among those limitations is the "narrow" political-question doctrine, which arises in two principal circumstances: those in which there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department" and those in which there is "a lack of judicially discoverable and manageable standards for resolving [the controversy]." *Zivotofsky* v. *Clinton*, 566 U.S. 189, 195 (2012).

"The second [circumstance] is at issue here"; it reflects the maxim that "law pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Vieth*, 541 U.S. at 278 (plurality). In law, unlike politics, ad hoc decision-making will not do; "judicial action must be governed by *standard*, by *rule*." *Ibid.* The "lack of judicially discoverable standards" indicates the commitment of the issue to the "political departments." *Baker* v. *Carr*, 369 U.S. 186, 214 (1962).

That is not to say that all cases with political consequences involve nonjusticiable political questions; the doctrine "is one of 'political *questions*,' not one of 'political *cases*.'" See *Davis* v. *Bandemer*, 478 U.S. 109, 122 (1986) (emphasis added) (quoting *Baker*, 369 U.S. at 217). Thus, "courts cannot reject as 'no law suit' a bona fide controversy as to whether some action * * * exceeds constitutional authority" simply because the action is "denominated 'political.'" *Ibid.*

b. Application of the First Amendment retaliation doctrine to cases like this one is manifestly justiciable.

The doctrine provides a timeworn framework that asks objective questions answerable with traditional evidence, by reference to ordinary legal standards. There is, in other words, a discernible and judicially enforceable right at issue here, and there are "principled, well-accepted rules" for enforcing it. *Vieth*, 541 U.S. at 308, 311 (Kennedy, J.).

Applied in this context, the First Amendment retaliation doctrine comprises three elements: (1) Did the State consider citizens' protected First Amendment conduct in deciding where to draw district lines, and did it do so with an intent to burden those citizens by reason of their political beliefs? (2) If so, did the redistricting map, in fact, dilute the votes of the targeted citizens or disrupt their political association? And (3) if so, is there a constitutionally acceptable explanation for the map's ill effects, independent of the intent to discriminate on the basis of political belief?

No one seriously disputes that the first and third elements are justiciable. Courts regularly adjudicate the question of legislative intent. See Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59 Wm. & Mary L. Rev. 1993 (2018) (citing examples). Courts also routinely address whether there are legitimate, alternative explanations for otherwise unconstitutional burdens. See generally *Mt. Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274 (1977).

The only question, therefore, is whether the second element of the First Amendment framework—the requirement that plaintiffs show that the redistricting plan burdened them in a practical way—is justiciable in federal court. Given the practical and functional nature of the burdens imposed, it plainly is.

c. We begin with the obvious: Vote dilution is a justiciable harm. See *Gill*, 138 S. Ct. at 1930-1931

(majority); *Cooper* v. *Harris*, 137 S. Ct. 1455, 1470 (2017). It is caused "either 'by the dispersal of [minority voters] into districts in which they constitute an ineffective minority'" or by "concentrat[ing minority voters] into districts where they constitute an excessive majority.'" *Voinovich* v. *Quilter*, 507 U.S. 146, 154 (1993) (quoting *Thornburg* v. *Gingles*, 478 U.S. 30, 46 n.11 (1986)).

The most developed body of law on vote dilution is in the context of racial vote dilution under Section 2 of the Voting Rights Act. To establish that vote dilution has "impede[d] the ability of minority voters to elect representatives of their choice" (*Gingles*, 478 U.S. at 48), a Section 2 plaintiff must satisfy the so-called *Gingles* preconditions:

First, the targeted voters must be sufficiently numerous and "geographically compact to constitute a majority in some reasonably configured legislative district." *Cooper*, 137 S. Ct. at 1470 (quotation marks omitted).

Second, "the minority group must be politically cohesive." *Ibid.* (quotation marks omitted).

Third, the majority "must vote sufficiently as a bloc to usually defeat the minority's preferred candidate." *Ibid.* (alterations incorporated; quotation marks omitted).

Each of these three elements is directed at the questions of burden and causation. If the targeted group is not "able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a [reasonably drawn] single-member district" in the area, then the drawing of the district's lines "cannot be responsible for minority voters' inability to elect its candidates." *Gingles*, 478 U.S. at 50.

Similarly, if the targeted group cannot "show that it is politically cohesive," then "it cannot be said that the [redistricting] thwarts [its] interests." *Id.* at 51.

And if the majority does not "vote[] sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate," then cracking the minority group will not "impede[] its ability to elect its chosen representatives." *Ibid.*

When these three conditions are satisfied, however, it follows that there has been a denial of "equal electoral opportunity" as a result of the lines that the legislature drew. *Johnson* v. *De Grandy*, 512 U.S. 997, 1012 (1994).[2]

We demonstrated below that the *Gingles* preconditions are satisfied in this case. *E.g.*, Dkt. 210, at 6-8; Dkt. 177-19, at 3-4 (expert report of Dr. Michael McDonald). Indeed, satisfaction of the preconditions is the premise of the swings in DPI and PVI, which also showed that plaintiffs and other Sixth District Republicans were deprived of "an equally effective voice in the election of a representative." JS App. 52a-53a.

Separate and apart from the *Gingles* preconditions, a plaintiff can also establish vote dilution by "pro-

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[2] To be sure, *Johnson* held that the *Gingles* preconditions by themselves are not independently "sufficient" to demonstrate a Section 2 vote dilution claim. 512 U.S. at 1011. The Court stressed that the focus of the inquiry must be, instead, on the deprivation of "equal electoral opportunity" in light of all "relevant facts." *Id.* at 1012. But *Johnson* was expressly framed as an interpretation of Section 2 of the VRA. And *Bartlett* v. *Strickland*, 556 U.S. 1 (2009), emphasized that this Court's opinions interpreting "the text of [Section] 2" do "not apply to cases in which there is intentional discrimination." *Id.* at 19-20. We thus rely on the *Gingles* preconditions only as a commonsense guide for identifying burden and causation in partisan gerrymandering cases involving intentional discrimination.

duc[ing] an alternative map (or set of alternative maps)—comparably consistent with traditional districting principles—under which her vote would carry more weight." *Gill*, 138 S. Ct. at 1936 (Kagan, J., concurring). We did that, too. See Dkt. 177-1, at 21.

d. The principal objective of any partisan gerrymander is to dilute the votes of the opposition party. "But partisan gerrymanders inflict other kinds of constitutional harm as well," including "infringement of the[] First Amendment right of association." *Gill*, 138 S. Ct. at 1934, 1938 (Kagan, J., concurring). For example, "[m]embers of the 'disfavored party' * * * deprived of their natural political strength by a partisan gerrymander, may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office." *Ibid.* "By placing a state party [and its supporters] at an enduring electoral disadvantage, the gerrymander weakens its capacity to perform all its functions." *Ibid.*

As the district court held, "the kinds of injury resulting from such associational violations [like this] are readily discernable and significant: 'Volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign.'" JS App. 57a (quoting *Anderson*, 460 U.S. at 792).

These are traditional First Amendment burdens, readily visible to the judicial eye. In *Anderson*, the Court confronted an early candidacy filing deadline that applied only to independent candidates. Invalidating that discriminatory regulation under the First Amendment, the Court explained that "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively" can be "heavily

burdened" by voting "restrictions" and "regulation[s]." 460 U.S. at 787-788. Courts faced with First Amendment challenges to such regulations must evaluate the burdens imposed using "an analytical process that parallels [their] work in ordinary litigation." *Id.* at 789. This requires consideration of "the character and magnitude of the asserted injury" measured against "the precise interests put forward by the State as justifications for the burden imposed." *Ibid.*

The Court ultimately invalidated the early filing deadline in *Anderson* because—as a matter of commonsense observation—it selectively "place[d] a particular burden on an identifiable segment of Ohio's independent-minded voters." 460 U.S. at 792. The deadline applied "unequally" among the political parties and therefore "burden[ed] the availability of political opportunity" based on the "political preferences" of voters—and was therefore unlawful. *Id.* at 793-794. The Court reached similar conclusions in *Cook* v. *Gralike*, 531 U.S. 510 (2001), concerning ballot notations, and *Elrod*, concerning patronage practices.

Application of this framework here is readily manageable. As the district court held, the "undisputed evidence amply demonstrates that the plaintiffs' associational rights were burdened." JS App. 63a. "Members of the Republican Party in the Sixth District, deprived of their natural political strength by [the] partisan gerrymander, were burdened in fundraising, attracting volunteers, campaigning, and generating interest in voting in an atmosphere of general confusion and apathy." *Ibid.* There is nothing nonjusticiable about that conclusion or the analysis underlying it.

The point, at bottom, is a simple one: If a State may not intentionally "burden[] the availability of political opportunity" using discriminatory filing dead-

lines (*Anderson*, 460 U.S. at 793); "dictate electoral outcomes" using ballot notations (*Gralike*, 531 U.S. at 523); or "deny a benefit to a person because of his constitutionally protected speech or associations" using patronage practices (*Elrod*, 427 U.S. at 359), neither may it intentionally do those things by manipulating district lines. And if the burdens are capable of rational judicial assessment in those other contexts, they are equally so in this one.

B. The State's rejoinders are misguided

The State offers unpersuasive rejoinders.

1. The State insists first (JS 16-18) that the decision below will outlaw the use of political data in pursuit of proportionally representative delegations, in violation of the holding of *Gaffney* v. *Cummings*, 412 U.S. 735 (1973). Not so.

Although it is not a question presented here, a State's good faith effort "fairly to allocate political power to the parties in accordance with their voting strength" (*Gaffney*, 412 U.S. at 754) would almost surely pass strict scrutiny. In *Branti* v. *Finkel*, 445 U.S. 507 (1980), for example, the Court concluded that "political affiliation" may be "a legitimate factor to be considered" when "essential" to a compelling government interest; the Court offered the apt example of achieving political equipoise in a slate of election judges. *Id.* at 518. See also *Elrod*, 427 U.S. at 367-368 (plurality) (a government official's discrimination based on political views is permissible to serve the "overriding interest" of hiring political loyalists in important "policymaking positions"). In light of these precedents, a narrowly-drawn effort to *undo* past gerrymandering and ensure fair representation is not likely to violate the First Amendment.

Regardless, *Gaffney* did not involve a First Amendment challenge. That matters, because an issue that is "neither brought to the attention of the court nor ruled upon" is "not to be considered as having been so decided as to constitute [a] precedent[]" on the issue. *Webster* v. *Fall*, 266 U.S. 507, 511 (1925). Accord, *e.g.*, *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). The same goes for every other gerrymandering case this Court has addressed under different constitutional provisions. See *Cooper*, 137 S. Ct. at 1488 (Alito, J., concurring in the judgment in part and dissenting in part) (observing that prior cases not involving First Amendment challenges have suggested that States "may engage in constitutional political gerrymandering").

2. The State says (JS 18) that the decision below permits no consideration of party affiliation. A simple read of the applicable framework shows otherwise: "the First Amendment analysis" asks "not whether political classifications were used," without more; rather, it asks "whether political classifications were used to burden a group's representational rights." *Vieth*, 541 U.S. at 315 (Kennedy, J.). Thus, mapmakers may "still use data reflecting prior voting patterns to advance legitimate districting considerations, including the maintenance of 'communities of interest.'" JS App. 200a.

Along similar lines, the State mistakenly suggests that because every redrawing of district lines risks some voter confusion, the standard applied below has no limit. JS 19, 24. But proof of associational harms, without more, would not make for a claim under the framework adopted below; rather, the harms must be a specifically intended penalty for citizens' politics.

The State offers the head-scratching rejoinder (JS 19) that the intent element of the test "contains no

means of distinguishing between permissible and impermissible political considerations." But the difference is self-evident between political considerations that *are* in service of a specific intent to burden voters for their past voting history and those that *are not*. See *Vieth*, 541 U.S. at 315 (Kennedy, J.). The State later says (JS 25-27) that gerrymandering defendants "will face difficulty" disproving intent. That gets matters backward: Proving intent in a case like this is "inordinately difficult." *Gingles*, 478 U.S. at 43-45. Indeed, many claims of unlawful intent are certain to be screened at the pleading stage. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 680-681 (2009).

3. The State wrongly asserts (JS 20-22) that "[t]he intent and effects elements adopted by the three-judge court can be evaluated only with reference to the prior map," in effect "[e]nshrining pre-existing maps as the constitutional touchstone for future redistricting."

Again, voters targeted by a gerrymander must show only that they are sufficiently numerous and "geographically compact to constitute a majority in [a] reasonably configured legislative district" in the area. *Cooper*, 137 S. Ct. at 1470. Thus, the benchmark for measuring vote dilution is not the immediately prior district; it is, instead, the full range of hypothetical districts that could have been drawn in the area—just as in any other vote dilution case. See *ibid.* To be sure, we know in this case that Republican voters *are* sufficiently numerous and compact because, between 1991 and 2011, they constituted a majority of a reasonably drawn district in western Maryland. But that is merely evidence to satisfy the standard, not a statement of the standard itself.

This observation clarifies that a deliberate continuation of a prior partisan gerrymander would also vio-

late the First Amendment, all other factors satisfied. The State is therefore wrong when it asserts (JS 21) that "voters whose districts did not change * * * would be barred" from challenging a redistricting map. We made this point below (Dkt. 210, at 6-7 & n.3), but the State has declined even to acknowledge, much less rebut, our argument.

4. In its only contention addressing justiciability as distinct from the merits, the State asserts (JS 24) that "a [numerical] standard for measuring burden is indispensable." In the State's view (JS 23-24), it is acceptable for legislators to intentionally inflict *some* degree of harm on voters for their voting histories, as long as it doesn't go too far—the problem is that the decision below does not offer any basis for determining "how much is too much." That is wrong on multiple levels.

To begin, it is wrong to say that *some* degree of intentionally inflicted harm in response to the expression of political views is constitutionally acceptable. The distinction that the First Amendment retaliation doctrine draws is one of kind, not degree: It forbids States from deliberately diluting citizens' votes and disrupting their political associations because lawmakers disapprove of those citizens' political views. That prohibition does not depend on the "size" of the burden. But it does leave a wide range of valid political considerations that are permissible in redistricting, including avoiding contests between incumbents (*Karcher* v. *Daggett*, 462 U.S. 725, 740 (1983)), respecting municipal boundaries and communities of interest (*LULAC*, 548 U.S. at 441), and allocating specific institutions to particular districts to preserve affinity relationships (Dkt. 104, ¶ 50).

Even if that were not so, the First Amendment does not demand a numerical standard for measuring

burden. "[A]s the branch whose distinctive duty it is to declare 'what the law is,' [this Court is] often called upon to resolve questions of constitutional law not susceptible to the mechanical application of bright and clear lines." *United States* v. *Lopez*, 514 U.S. 549, 579 (1995) (Kennedy, J., concurring). "[I]t is an essential part of adjudication to draw distinctions, including fine ones, in the process of interpreting the Constitution" one case at a time. *Walz* v. *Tax Comm'n*, 397 U.S. 664, 679 (1970). Thus, the Court has never before required a universal "'litmus test' that would neatly separate valid from invalid" burdens as a precondition to exercising Article III jurisdiction in election-law cases. *Crawford* v. *Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008) (plurality). It should not start here.

II. THE DISTRICT COURT PROPERLY GRANTED JUDGMENT TO PLAINTIFFS

A. The decision below rests entirely on undisputed facts

After repeatedly telling the district court that the parties' disputes are strictly legal and that no trial was necessary, the State now faults the district court for not ordering a trial after all. The State thus likens this case to *Hunt* v. *Cromartie*, 526 U.S. 541 (1999), asserting (JS 28) that the court improperly "resolved disputed facts pertaining to multiple elements of plaintiffs' claims." That gives new meaning to the phrase "wide of the mark."

a. As an initial matter, *Hunt* is readily distinguishable. There, the district court granted summary judgment "before either party had conducted discovery and without an evidentiary hearing." 526 U.S. at 545. Although the parties attached "supporting materials" to their summary judgment papers, the plaintiffs "offered only circumstantial evidence in support of

their claim" and notably lacked "direct evidence of intent." *Id.* at 545, 547.

Here, the opposite is true: "The parties have conducted and completed extensive discovery, and neither the plaintiffs nor the State has requested any more." JS App. 3a. After all that, "the record is replete with direct evidence" of intent (*id.* at 49a), including numerous facts that were jointly stipulated by the parties (*id.* at 50a; Dkt. 104) and otherwise admitted by the State (*e.g.*, Dkt. 191-15, at 16). In light of the undisputed nature of the relevant facts, both parties took the position that no trial was warranted. *E.g.*, Dkt. 177-1, at 25; Dkt. 186-1, at 25-46.[3]

b. Beyond that, there were no disputes of material fact warranting a trial. The State asserts (JS 29-30) that there is a dispute between (on the one hand)

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[3] Against this background, it is debatable whether the district court's decision is better understood as a summary judgment or a judgment following submission on the papers.

"In a nonjury case" like this, "when the basic dispute between the parties," if any, "concerns only the factual inferences that one might draw from the more basic facts to which the parties have agreed, and where neither party has sought to introduce additional factual evidence or asked to present witnesses, the parties are, in effect, submitting their dispute to the court as a 'case stated.'" *United Paperworkers* v. *Int'l Paper Co.*, 64 F.3d 28, 31 (1st Cir. 1995). Accord, *e.g.*, *EEOC* v. *Maricopa Cty. Cmty. Coll.*, 736 F.2d 510, 513 (9th Cir. 1984). In that event, the district court is "freed from the usual constraints that attend the adjudication of summary judgment motions, and may engage in a certain amount of factfinding, including the drawing of inferences." *United Paperworkers*, 64 F.3d at 31 (quotation marks omitted).

If the decision below *is* better understood as a judgment following submission on the papers, clear error (rather than de novo) review applies. See *United Paperworkers*, 64 F.3d at 31; *Maricopa Cty. Cmty. Coll.*, 736 F.2d at 513. Cf. *Cooper*, 137 S. Ct. at 1464-1465 (giving the district court "significant deference on appeal," including clear-error review of factual findings).

evidence establishing that some of the plaintiffs were politically engaged and (on the other hand) evidence establishing that plaintiffs' associations were disrupted. That evidence is factually consistent. Even if it created a dispute, the dispute would be immaterial: The point is that plaintiffs' ability to band together with *others* has been inhibited by the gerrymander's associational interruptions, not that they *personally* became disengaged in politics. See JS App. 60a-61a.

The State is also wrong to say (JS 33) that the district court "refused to accept as true defendants' showing that changes in the Sixth District's boundaries were driven by legitimate legislative decisions." In fact, the district court expressly assumed the truth of the State's assertion that "other causes" were at work. JS App. 55a. It found, however, that there was no evidence that any of the supposed alternative justifications was capable, alone or together, of "explain[ing] the dramatic exchange of populations between the Sixth and Eighth Districts." *Ibid.* Rightly so.

The State's evidentiary objections (JS 30-33) are likewise unavailing. For starters, the admissibility of evidence is a legal matter—an objection to the entry of evidence does not mean that the evidence is "disputed" in the Rule 56 sense. Nor is there anything unusual or problematic about the district court's disposition of the State's objections; a court may "implicitly dispose[]" of evidentiary objections at the Rule 56 stage "by granting the summary judgment motion and relying on the evidence * * * objected to." *Campbell* v. *Shinseki*, 546 F. App'x 874, 879 (11th Cir. 2013). Accord, *e.g.*, *Ambat* v. *City & Cty. of S.F.*, 757 F.3d 1017, 1032 (9th Cir. 2014).

Nor do the State's evidentiary objections hold up on their merits. As an initial matter, the question is only

whether the cited evidence is *capable* of being "presented in a form that would be admissible in evidence" at trial, regardless whether it is presently so. Fed. R. Civ. P. 56(c)(2). All of the evidence met that standard.

Neither Strine's nor Ropp's testimony was hearsay because neither was offered to establish the truth of the matters asserted. Strine, for example, testified that "every time we were out [campaigning]," voters told her "it's not worth voting anymore." JS App. 26a. The testimony was not offered as proof that it literally wasn't worth voting anymore. It was offered instead as evidence of voter sentiment, reflecting depressed voter interest and engagement. Cf. *United States* v. *Brown*, 490 F.2d 758, 762-763 (D.C. Cir. 1973) ("[T]he statement 'X is no good' circumstantially indicates the declarant's state of mind toward X."). The same is true with respect to Ropp's testimony concerning voter confusion. JS App. 26a-27a.

The State's objection (JS 31-33) to the campaign finance reports is bizarre, and the court below correctly rejected it (Dkt. 219). First, the reports—which are made available on the defendants' own website—are "unsworn statements declared to be true under penalty of perjury," and they are thus admissible as "declarations" for purposes of Rule 56. *Williams* v. *Long*, 585 F. Supp. 2d 679, 685 (D. Md. 2008). Second, the reports are self-authenticating records of regularly conducted activity. *E.g.*, *Doali-Miller* v. *SuperValu, Inc.*, 855 F. Supp. 2d 510, 518-519 (D. Md. 2012). Third, they are subject to judicial notice. *E.g.*, *Malin* v. *XL Capital Ltd.*, 499 F. Supp. 2d 117, 133 (D. Conn. 2007). Bottom line: The reports obviously could have been admitted

into evidence at trial. And the State did not offer any evidence bringing their contents into dispute.[4]

Finally, the State is wrong (JS 34) that the causation element of plaintiffs' claim required a trial. The preliminary injunction decision erroneously held that plaintiffs had to prove that the gerrymander alone dictated the outcomes of the congressional elections in 2012, 2014, and 2016 and that it would "continue to control the electoral outcomes in [the] district." JS App. 100a, 105a-113a. The opinion granting summary judgment corrected that error, holding that our burden was to show only that the plaintiffs "have been placed at a concrete electoral disadvantage." *Id.* at 52a. Thus, the difference in the two decisions is legal.

B. The district court correctly rejected the State's delay argument

The State's delay argument can be dispatched quickly. The district court—which had a front-row seat to all aspects of the litigation for the past four-plus years—found that there were no "dilatory efforts" by either side, attributing the dragging on of the litigation to "process." JS App. 66a. That conclusion was not an abuse of discretion.

This Court's affirmance of the denial of preliminary relief does not change matters. The Court based its decision on the late filing of the preliminary injunction motion and the proximity of the 2018 election. *Benisek*,

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[4] The State introduced evidence bearing on plaintiffs' claim of associational burdens (see JS 31), but it did not include evidence bearing on fundraising specifically. It now attempts to introduce such evidence for the first time on appeal. See JS 8 & n.3; JS 33 & n.10. That evidence—which has been reported to be inaccurate (*e.g.*, John Fritze, *Bartlett Struggles with Campaign Disclosure*, Balt. Sun (June 24, 2012), perma.cc/2Z64-4NWJ?type=image)—is not properly before the Court. See Fed. R. App. P. 10(a).

138 S. Ct. at 1943-1945. But as the district court explained (JS App. 66a), permanent injunctive relief "was requested when the litigation was first commenced in 2013."[5] And as the State admits (JS 38-39), "there remain[s] time to implement a new plan for the 2020 election." See also Dkt. 227. A denial of relief for a "serious constitutional violation" simply because the litigation took years to conclude would "demean[]" plaintiffs' First Amendment injuries. JS App. 65a.

Nor is it an answer to say "[just] bear it because it will be over soon." JS App. 65a. The State's citations to case law do not suggest otherwise. In *White* v. *Daniel*, 909 F.2d 99 (4th Cir. 1990), "there [were] no elections scheduled before * * * [the next] census," meaning that the case was moot. *Id.* at 104. Here, the 2020 election has yet to take place. And in *Skolnick* v. *Illinois State Electoral Board*, 307 F. Supp. 691 (N.D. Ill. 1969), the passage of time made correcting the one-person-one-vote claim in that case practically impossible. *Id.* at 694-695. The same cannot be said here. Every other case cited at pages 36 to 37 of the jurisdictional statement is similarly distinguishable.

Courts regularly enter injunctive relief late in a redistricting cycle when the constitutional violation can be corrected. *E.g.*, *Perez* v. *Abbott*, 267 F. Supp. 3d 750 (W.D. Tex. 2017) (granting injunction in August 2017), affirmed in part and reversed in part on unrelated grounds, 138 S. Ct. 2305 (2018). It was not an abuse of discretion for the district court to do so here.

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[5] The initial pro se complaint is "to be liberally construed." *Erickson* v. *Pardus*, 551 U.S. 89, 94 (2007) (per curiam).

For the foregoing reasons, the Court should summarily affirm. If it notes or postpones probable jurisdiction in this case and *Rucho* v. *Common Cause* (No. 18-422), it should consider scheduling oral argument for the same date. See *Benisek* v. *Lamone*, No. 17-333, 3/28/2018 Hr'g Tr. 26:8-27:7 (Justice Breyer proposing "reargument" in multiple partisan gerrymandering cases at once so that the Court could "see them all together"). Doing so would ensure a broader spectrum of legal arguments and a more substantial combined factual record upon which to consider the issues presented in the appeals.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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DECEMBER 2018